BEFORE THE CITY OF SEATTLE
ETHICS AND ELECTIONS COMMISSION

IN THE MATTER OF

COMPLIANCE WITH

SMC 2.04.300

CITY OF SEATTLE

APPEAL OF DISMISSAL OF CASE NO. 14-2-0527, THAT THE DEPARTMENT OF
INFORMATION TECHNOLOGY AND THREE CITY COUNCILMEMBERS ILLEGALLY USED PUBLIC FACILITIES AND RESOURCES TO PROMOTE PROPOSITION 1, REGARDING A METROPOLITAN PARK DISTRICT

I. INTRODUCTION

This appeal submits that, contrary to a June 25 dismissal by the Seattle Ethics and Elections Commission (SEEC) executive director (henceforth “the director”) of a May 22, 2014 complaint, the Department of Information Technology and three City Councilmembers used public facilities and resources in contravention of Seattle Municipal Code 2.04.300 to promote Proposition 1 (creating a Metropolitan Park District). This appeal asks the Commission to reverse the dismissal and to instruct the Director to negotiate a settlement agreement with DoIt as already drafted by Commission staff. This appeal also asks the Commission to find that additional violations unnecessarily occurred after I called the director’s attention to the issue by a voice mail, and after I filed the May 22 complaint; and I ask the Commission to instruct the director in future cases to act swiftly to stop similar abuses from continuing after a telephone or written complaint has been lodged.

II. FACTS OF THIS CASE AND THE COMPLAINT AND DISMISSAL
Regarding the City of Seattle’s alleged use of public facilities to promote City Proposition 1

Seattle Channel is administered by the Seattle Dept. of Information Technology (DoIT). In the channel’s May 13, 2014 program “City Inside Out,” DoIT contractor Brian Callahan and City Councilmembers Bagshaw, Burgess, and Sawant in an eight minute, 37 second segment discussed Proposition 1, a measure creating a Metropolitan Park District which the City Council had placed on the ballot April 28. The show can be found on the City web site at http://www.seattlechannel.org/videos/video.asp?ID=3341405; the segment about Proposition One is times between 13:49 and 22:16. Publicity for the video that is on the web site includes the tag line, “Are taxpayers ready to support a Metropolitan Parks District to fix the City’s parks?” However, as alleged in the complaint and confirmed by the SEEC investigation, Callahan’s questions and the comments by the City Councilmembers did not address predictions about how taxpayers would vote, but rather strayed into advocacy, as the SEEC director concluded in his June 25 letter, where he states (p. 2): “I believe that a reasonable person viewing the eight-minute segment on the MPD would conclude that, viewed in its totality, the segment promoted the ballot proposition.”

Unfortunately, this conclusion came too late to prevent a compounding of the illegal behavior I had called to the attention of the SEEC. In fact, as soon as I became aware of the program (sometime between May 13 and May 18), I left a voice mail message for the SEC director about the program’s misuse to promote Proposition 1. When I didn’t hear back from him, I left an additional voice mail asking for
a response. On May 20 he replied in an e-mail, stating “I had a chance to watch the segment today and I’m not prepared to say without further examination whether I believe it violates the Elections Code or not…. If you’re inclined, please do send us a complaint.” I sent in a detailed written complaint two days later, on May 22. The complaint stated that DoIT, Callahan, and the City Councilmembers had discussed the ballot measure in a way that “was not the ‘objective and fair presentation of the facts’ that SMC 2.04.300 requires when City resources are used for commenting on an upcoming ballot measure. Immediate remedies are needed and proposed below.” The requested remedies included that “the Commission’s Executive Director should instruct the Department of Information Technology not to broadcast the referenced City Inside/Out show further.”

On June 25, more than one month after I had filed the written complaint, the director issued a letter dismissal of the complaint. The SEEC investigative file (obtained through my public records request) reveals that during the period after SEEC received my written complaint, the Seattle Channel had broadcast the offending program twelve times. Also between my earlier phone complaint and the written complaint, the Seattle Channel had broadcast the program numerous additional times. There is no evidence in the file that during his investigation the Executive Director made any effort to discourage the ongoing broadcast of the program, which eventually was broadcast and thus made available to all Seattle cable subscribers 27 times.
SMC 2.04.300, "Prohibition against use of public office facilities in campaigns", prescribes as follows:

No elected official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include but are not limited to use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the officer or agency; provided, that the foregoing provisions of this section shall not apply to the following activities:

A. Action taken at an open public meeting by the City Council to express a collective decision or to actually vote upon a motion, proposal, resolution, order or ordinance, or to support or oppose a ballot proposition so long as (1) any required notice of the meeting includes the title and number of the ballot proposition, and (2) members of the City Council or members of the public are afforded an approximate equal opportunity for the expression of an opposing view;

B. A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry; and

C. Activities that are part of the normal and regular conduct of the office or agency.

III. DIRECTOR IS IN ERROR IN EXCULPATING CITY COUNCILMEMBERS AND THEIR STAFFS; THE "SPECIFIC INQUIRY" EXEMPTION DOES NOT APPLY

The Commission must overrule the Director's dismissal of the case against the City Councilmembers, and refer it back to him for further investigation and action, including not just for their comments, but also for the efforts by City Councilmembers and their staffs in arranging for the so called "specific inquiry" that seemingly justified the violative comments. The director is grossly in error in stating that
The promotional remarks of the three elected officials all fit into the exception under SMC 2.04.300.B for “statement[s] by an elected official in support of or in opposition to any ballot proposition...in response to a specific inquiry.” All three asked specific questions about the MPD, and all three answered those questions.

For the following reasons, the Director’s attempted exculpation of the City Councilmembers based on this exemption cannot apply in this case, and they should be sanctioned for violation of the law:

(1) The director is in error and at odds with the actual findings of his own investigative staff in excusing the City Councilmembers’ rank advocacy as having responded to a “specific inquiry.” Their violation of the election code must not be countenanced because they helped arrange for Callahan to pose the “specific inquiry” to themselves. What the director erroneously regards as an exempt “specific inquiry” actually stemmed from a mutual arrangement between DoIT and the City Council. The director evidently is unaware that his SEEC investigators obtained the draft script for Callahan’s comments and discovered that previous to the recording of the show, Callahan and Seattle Channel station manager John Giamberso provided this draft script to the City Councilmembers and their staffs (including not only personal staffs but also the Council’s Communications Director); and that they discussed the questions with them in person, by phone, and/or by e-mail. The practiced responses during the show by the City Councilmembers can now be understood for what they were: not spontaneous responses that are allowed by law, but well-rehearsed presentations that appeared to be responding to a “specific inquiry” which was actually prearranged and approved by them.
as part of the secret script. Such behavior must be deemed by the
Commission as a violation of elections law; otherwise, elected
officials can at will, by arranging for scripted questions from City
employees or contractors that are passed off as spontaneous “specific
inquiries,” abuse their access to the City television station and
other City facilities to influence voters about an existing ballot
measure. Since commercial and public television stations have
dramatically reduced their campaign coverage in recent decades, the
misuse of City television facilities is an increasingly serious
matter.”

(3) The violation of law in this case is deeper than just what
Callahan and the Councilmembers stated on the TV program. The SEEC
investigation unveiled deliberate coordination by them and by the
Seattle Channel director and by City Council staff to prepare for the
violative acts. City Councilmembers are responsible not only for what
they say on a TV program, but for not encouraging beforehand the
misuse of their own staffs and misuse of the Seattle Channel for
illegal promotion of a ballot measure. Their staffs, so, are
prohibited by the Elections Code from engaging in such behavior. And
the City Councilmembers and their staffs are not only are prohibited
from engaging in such preparatory efforts; they are also required to
report such illegal preparatory efforts if they are aware of them.
Unfortunately, in this case the City Councilmembers and their staffs
were themselves deeply engaged in the preparatory efforts, which were
uncovered by the SEEC investigation triggered by my complaint.
Regarding the City of Seattle’s alleged use of public facilities to promote City Proposition 1

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(4) Because the Councilmembers cannot hide behind the exemption for a “specific inquiry,” they are bound by the requirements of City and State law that their comments about the ballot measure be an “objective and fair presentation of facts.” The SEEC Director’s own dismissal letter admits that their comments were promotional, and so I do not need to rehearse here the reasons shown in my complaint, in his dismissal letter, and in the SEEC investigative files that the comments made by the Councilmembers, especially by Bagshaw,” did not in any come near to being the allowable “objective and fair presentation of facts.”

IV. THE DEPARTMENT OF INFORMATION TECHNOLOGY MUST BE SANCTIONED FOR ITS VIOLATIONS OF LAW, PREFERABLY BY THE SETTLEMENT AGREEMENT PREPARED FOR THE DIRECTOR BY THE SEEC INVESTIGATIVE STAFF

The Commission must overrule the SEEC director’s failure to sanction the clear violations in this case. He is fundamentally mistaken in stating (p. 3) that “This case does not lend itself to the Commission’s enforcement powers.” On the contrary, failure by the Commission to impose sanctions in this case will create an attitude of impunity in the Department of Information Technology and throughout City government.

Instead of engaging the Commission’s enforcement powers, the director only (p. 3) has “advised the Seattle Channel to put a moratorium on discussions of the many state and local ballot propositions that will be on the ballot this year until the Commission can provide guidance on compliance with the Elections Code.” On the same page, the director’s dismissal letter also states that “I am
asking the Commission to provide binding advice on what, if anything, hosts, or guests may say on the Seattle Channel about ballot propositions or candidacies without running afoul of the Elections Code’s bar on using City facilities to promote or oppose ballot measures.” The director’s statements fly in the fact of the clear evidence of elections code violations in this case; they are difficult to square with his statements just days later during the Commission’s July 2 consideration of my request that the Commission develop an advisory opinion to guide agency behavior regarding ballot measures. On July 2, the Executive Director argued the opposite (as he had done for two years, since I first proposed such an advisory opinion to the Commission); he argued then that an advisory opinion regarding agency behavior regarding ballot measures is not needed because the rules are already clear.

The SEEC director is seriously in error in his claim (p. 3) that “Brian Callahan’s questions didn’t promote the ballot measure. He counterbalanced the promotional comments of the elected officials with questions about governance and tax fatigue.” The director’s error can clearly be seen in the actual Callahan questions that the director’s own staff summarized (p. 2) in their proposed draft settlement agreement with DoIT, a proposed agreement that he chose to ignore:

What ‘do we get if we pass it.’
Where ‘does the money go’ and ‘what does the money pay for.’
How would you answer critics of the current MDP governance structure?
What do you “say to people” who are concerned about “getting a lot of taxes at once.”
These questions are certainly not “counterbalanced”; they are promotional softballs without research or follow-up by which the Department of Information Technology used the City-owned television facilities in its care to influence voters to favor Proposition 1 in clear violation of city and state election laws.

The SEEC director goes even further (p. 3) to excuse the Department of Information Technology’s clear transgressions: “even if I assume arguendo that his [Callahan’s] questions did promote the ballot proposition, Callahan is a contractor—not an appointee or an employee—and therefore not subject to SMC 2.04.300.” This position is questionable. Whether a person is an employee, a contractor, or has no economic relation to the City, their use of City resources to influence votes on a ballot measure is a serious matter that the SEEC director and Commission have leverage over. To hold otherwise would allow continuing violations of the City Elections Code without prompt and effective recourse.

The SEEC director is also clearly in error in stating that besides Callahan “the leadership of the Seattle Channel—General Manager John Giamberso—as the only other actor who could reasonably be charged with a violation of SMC 2.04.300.” The director claims that Giamberso was only the “captain of the ship” who “did not stand to benefit in any way from the alleged violation,” and that Giamberso had not “behaved inappropriately in some way.” Again, the SEEC director appears not to be aware of what his own investigators discovered, namely that Giamberso worked in tandem with Callahan to provide the...
script beforehand to the City Councilmembers and their staffs. He was completely aware of the illegal interaction, and in fact had much to gain for his station and personal position by ingratiating himself with the City Councilmembers who determine his budget.

To make matters worse, the SEEC director attempts to excuse the abuses by a baseless claim that the Seattle Channel is somehow not a City agency. Despite the fact that my complaint was lodged against the Department of Information Technology, the SEEC Director essentially excuses (although discouraging it in the future) and leaves unsanctioned the violative behavior by portraying the Seattle Channel as a quasi-independent entity. But it is not meaningfully independent. Just the fact that Brian Callahan and his supervisor John Giamberso shared the interview questions beforehand with the City Councilmembers and their staffs—a practice regarded as unethical in the journalism profession, especially when viewers are not told it had occurred—indicates that this is not a media organization, but a government entity.

The SEEC investigative staff understood the situation correctly, and developed for the SEEC director a proposed settlement agreement under which the DoIT director would “acknowledge the violation of the Seattle Elections Code when the Seattle4 Channel aired a program indirectly or directly supporting an August 2014 ballot measure.” This settlement agreement is excellent. The Commission should instruct the director to pursue negotiations with DoIT to conclude such a settlement agreement.
V. THE COMMISSION SHOULD ESTABLISH PROCEDURES TO REQUIRE PROMPT RESPONSE TO COMPLAINTS DURING A BALLOT MEASURE CAMPAIGN

The May 22 complaint warned (p. 5):

The August 5 election is fast approaching, and mailed ballots will begin to arrive barely more than two months from now. The Ethics and Elections Commission must act quickly to sanction the Department of Information Technology and these City Councilmembers for using City resources to influence a “yes” vote on Proposition One.

Nevertheless, the Executive Director took until June 25 (more than a month, and just six weeks before the Aug. 5 election) to act on the May 22 complaint. Truly in this case, justice delayed was justice denied. The Commission must ascertain and fix the sources of this dilatory performance, and ensure much prompter action during a ballot measure campaign.

V. CONCLUSION

The actions by the Department of Information Technology and the City Councilmembers alleged in my May 22 complaint are in fact violations of election law. Moreover, the SEEC investigation has found additional violations by the City Councilmembers and also by City Council staff because in addition to what was said on the City’s TV broadcast, the Councilmembers and staff members coordinated with an executive and a contractor in the Department of Information to facilitate the illegal behavior, and moreover did not report these efforts by themselves and others to the Ethics and Elections Commission so that the Commission could discourage such efforts or terminate the illegal broadcast. The Commission must either remand this matter to the Director for an expanded investigation; or the
Commission must itself find and sanction that serious violations of law have occurred.

The laws that restrict how public officials and agencies can comment on ballot measures are there for a reason. The incentives are too great for them to dissemble and to displace democracy with the people’s own money and power. The Department of Information Technology and the City Councilmembers and their staffs understand fully well that the resources they control can influence voters, and in this case they have used these powers in a way that did contravene City and state elections laws to promote Proposition 1.

I declare under penalty of perjury of the laws of the State of Washington that I am a registered voter of the City of Seattle, and that the information in the above complaint, and the exhibits provided, are true and correct.

Dated this July 16, 2014

Chris Leman